

## **REMARKS/ARGUMENTS**

Claims 32-44 are pending in the application.

### **Claim Rejections – 35 U.S.C. § 102**

In paragraph 5 on page 2 of the Office Action, claims 32-38 and 40-44 are rejected under 35 U.S.C. §102 (a) because the applicant did not invent the claims subject matter, as evidenced by MacWilliams et al. (EP 1129866).

### **Claim Rejections – 35 U.S.C. § 103**

In paragraph 6 on page 4 of the Office Action, claim 39 is rejected under 35 U.S.C. § 103(a) as being unpatentable over MacWilliams et al. (EP 1129866).

### **Remarks**

The Examiner has substituted foreign publication of applicant's own art , EP 1129866 for USP 6 385 860, on the grounds that 35 USC sec 103c is not applicable to a rejection under 35 USC 102(a). Whether this is the correct analysis of sec 103c or not is moot because EP 1129866 cannot be applied as a reference because of a Rule 1.136 affidavit of the inventor *already on file in this case* (filed 18 June 2007- in fact it was also submitted twice, once in 2006). This 131 affidavit was accepted to remove another reference of record, but stands against all references to be considered against these claims. This affidavit of record, makes the publication date of EP reference (September 5, 2001) well after the conception date of *at least as early as* 24 October 2000. This means that, with the 131 affidavit on file the EP reference should not have been asserted as prior art. The failure to notice this 131 affidavit was no doubt an oversight by the examiner as this is a lengthy file history.

*Thus, if the examiner finds other grounds for further rejection of this application, such further action must be **non-final**.*

## **CONCLUSIONS**

In view of the reasons provided above, it is believed that all pending claims are in condition for allowance. Applicant respectfully requests favorable reconsideration and early allowance of all pending claims.

If a telephone conference would be helpful in resolving any issues concerning this communication, please contact Applicant's attorney of record, Michael B. Lasky at (612) 436-3152.

Respectfully submitted,

Altera Law Group, LLC  
Customer No. 22865

Date: March 3, 2009

By:       /Michael Lasky/        
Michael B. Lasky  
Reg. No. 29,555  
MBL/